

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Docket No. 129154

JULIAN DALE KEY,

Defendant-Appellee.

Wayne Circuit Court No. 02-5202-01
Court of Appeals Docket No. 247719

DEFENDANT-APPELLEE'S ANSWER IN OPPOSITION
TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

CERTIFICATION OF SERVICE

129154'

JONATHAN B.D. SIMON (P35596)
Attorney for Appellee
717 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 964-0533

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Defendant-Appellee Julian Dale Key Jenkins, by and through Jonathan B.D. Simon, his attorney, answers in opposition to Plaintiff-Appellant's Application for Leave to Appeal, stating:

1. On December 11, 2002, Defendant-Appellee and his co-defendant, Cedric Pipes, were convicted in the Wayne Circuit Court of first degree premeditated murder [MCL 750.316(1)(a)] following a trial by jury. On January 9, 2003, he was sentenced to life imprisonment. On January 14, 2003, Appellee claimed an appeal of right to the Michigan Court of Appeals alleging, *inter alia*, that his conviction must be reversed where the trial court denied him his due process rights to a fair trial where it denied the motion for a trial or jury separate from that of Defendant Pipes. In an opinion dated May 31, 2005, his conviction was reversed on those grounds alone.

2. Multiple statements from each defendant were admitted into evidence at trial:

a. On March 26, 2002, Appellee gave a written statement to the police asserting that he with Defendant Pipes and a Damon Clark in Appellee's girlfriend's Jeep when Pipes got into an argument with drug dealers Close and Smith over drug territories. Later that day he observed the Jeep riddled with bullets and the car earlier driven by Close and Smith leaving the scene. Appellee and Pipes discussed revenge. Later that day, Pipes and Clark drove a rental car past a house where Close and Smith were believed to be located. Pipes shot a nine millimeter. Clark shot an AK-47. Another man, Pierre, followed in the Jeep.

b. On March 27, 2002, Appellee made a second written statement to the police, asserting that he did not fire the shots; that he did not know who fired the shots; that he was not in the Jeep; and that he did not participate in the shooting. He

then stated that he and Pipes were involved earlier argument with Close and Smith and that he was with Pipes in the rental car during the drive by shooting and that he shot the AK-47.

c. On March 26, 2002, Pipes made a written statement to the police, asserting that he was with Appellee the day before the shooting; that he was involved in an incident with Smith; that he was later told by Appellee that the Jeep was damaged by Smith and Close; that Appellee threatened to kill Smith in retaliation; and that Appellee later admitted to Pipes that he and Pierre drove past the house in a car and the Jeep and shot at the house intending to kill Smith but shot a little girl by mistake.

d. On March 27, 2002, Pipes made an oral statement to the police, asserting that after Appellee learned that Smith was responsible for shooting the Jeep, Appellee obtained a rental car and drove it past the house with a person named Marcus while Pipes and Damon followed in the Jeep.

e. On March 28, 2002, Pipes gave a third (second written) statement to the police asserting that Appellee told him that Smith had shot the Jeep; that Appellee knew where Smith could be found; that Appellee asked Pipes to borrow a car; that Pipes provided Appellee with a rental car and followed in the Jeep; and that Appellee fired a nine millimeter and Marcus fired a rifle. Pipes denied firing any shots.

3. Before trial, Appellee moved for a separate trial or separate jury. Severance was denied based upon an offer of proof that both defendants intended to testify. After the statements were admitted at trial, neither defendant testified.

4. The Court of Appeals properly concluded that both were thereby denied the opportunity to cross examine each other regarding their various statements to the police.

WHEREFORE, Defendant-Appellee Julian Dale Key prays Plaintiff-Appellant's Application for Leave to Appeal be denied.



JONATHAN B.D. SIMON (P35596)
Attorney for Appellee
717 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 964-0533

Dated: August 10, 2005

STATE OF MICHIGAN
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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Docket No. 129154

JULIAN DALE KEY,

Defendant-Appellee.

Wayne Circuit Court No. 02-5202-01
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BRIEF IN SUPPORT OF DEFENDANT-APPELLEE'S ANSWER IN OPPOSITION
TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

JONATHAN B.D. SIMON (P35596)
Attorney for Appellee
717 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 964-0533

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STATEMENT OF QUESTION PRESENTED

MUST APPELLANT’S CONVICTION BE REVERSED WHERE THE TRIAL
COURT DENIED HIM HIS DUE PROCESS RIGHTS TO A FAIR TRIAL WHEN
IT DENIED THE MOTION FOR SEPARATE TRIALS OR SEPARATE JURIES

Defendant-Appellant answers this question "Yes".
Plaintiff-Appellee answered this question "No".
The trial court answered this question "No".
The Court of Appeals answered this Question “Yes”.

STATEMENT OF APPELLATE JURISDICTION

On December 11, 2002, Defendant-Appellee was convicted in the Wayne County Circuit Court following a trial by jury. On January 9, 2003, he was sentenced. On January 14, 2003, Appellee claimed an appeal of right to the Michigan Court of Appeals pursuant to Mich Const 1963, art 1 sec 20, MCL 600.308(1), MCL 770.3, MCR 7.203(A), MCR 7.204(A)(2). In an opinion dated May 31, 2005, Appellee’s conviction was reversed. On July 25, 2005, Plaintiff-Appellant filed an Application for Leave to Appeal to this Honorable Court on or about July 25, 2005. This Court has jurisdiction pursuant to MCR 7.301(A)(2); 7.302(C)(2)(C).

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STATEMENT OF FACTS

(Parenthetical reference "P" refer to transcripts of the April 18, 2002 preliminary examination, conducted in the 36th District Court for the City of Detroit before the Hon. Jimmylee Gray. "T1" through "T7" and "S", respectively, refer to transcripts of the December 2, 3, 4, 5, 9, 10, 11, 2002 jury trial and January 9, 2003 sentencing conducted in the Circuit Court for the County of Wayne., before the Hon. Brian R. Sullivan. Numbers following cite specific pages therein.)

Defendant-Appellee Julian Dale Key (hereinafter "Appellee") along with codefendant Cedric Pipes were charged in a six count complaint and warrant. Count one charged both with first degree premeditated murder [MCL 750.316] as to complainant Destinee Thomas. Counts two, three and four, respectively, charged both with assault with intent to murder [MCL 750.83] as to complainants Eddie Smith, Terrell Brown and Sean Taylor. Counts five and six separately charged each defendant with felony firearm [MCL 750.227]. On April 18, 2002, they appeared for preliminary examination.

At the examination, the parties stipulated that Dr. Yung H. Chung is and expert in the field of forensic pathology and is employed at the medical examiner's office. On March 23, 2002, Dr. Chung performed an autopsy and made inquiry into the cause and manner of death of one Destinee Thomas, a three year old black female who was properly identified to authorities of the Wayne County Medical Examiner's Office. Dr. Chung found a gunshot wound which entered the left temporal head behind the ear. There was injury in the form of massive destruction of the left temporal and frontal brain, a comminuted fracture of the base of the skull and a large gaping wound of the left temporal and parietal bone. A small lead fragment was recovered from the right frontal brain. The direction of the wound was left to right and upward. Additionally, there was a grazing wound on the top of the left shoulder involving superficial soft tissue. In the opinion of Dr. Chung, the cause of death was a gunshot wound to the head. The manner of death was homicide. (P 5-6).

Terrell Brown testified that he is the stepfather of Destinee Thomas. On March 23, 2002, he lived at 5669 Woodrow Street in the City of Detroit. Destinee's mother, Deneen Thomas, and three other persons also lived at that address. Brown stated that he grew up near Appellee, and that he had often seen Appellee with Defendant Pipes. At about 5:00 that evening, Brown was entering his house. Eddie Smith and Sean Taylor were approaching the house as well. A green Jeep

approached the house and stopped beside a white car. Multiple shots were fired at the house from the direction of the Jeep. The Jeep then sped away. Brown then observed Destinee laying on the floor bleeding. Brown stated that he did not know the location from which the shots were fired; that he did not see who was in the Jeep; and that he did not see any shots or sparks coming from the Jeep. On previous occasions, he had seen Appellee drive the Jeep. (P 7-34).

Sean Taylor stated that he was standing on the side of 5669 Woodrow at 5:00 p.m. March 23, 2002. The only other person outside the house at the time was Brown. Brown's sister's boyfriend was also present. He observed a blue car pull up slowly, a green truck pull up slowly behind the car, a gun emerge from the car and then rapid fire shooting. Both vehicles then left at a rapid pace. Taylor stated that the shooting was not in his direction. The windows on the Jeep were tinted and he could not identify any occupants. He described the shooter in the car as being a dark skinned slim younger male in his early twenties. After the vehicles left, he returned to the house, where he saw a baby on the floor. (P 35-55).

Detroit Police Investigator Andrew Sims testified that on March 27, 2002 he advised Appellee of his rights and the two spoke. According to Sims, Appellee refused to make a statement. Sims then memorialized their conversation in a report. According to Sims, Appellee stated that he and Pipes had an argument with two other persons about selling narcotics from their location. Someone then shot up his girlfriend's Jeep. Key rented a car from a crack head. Pipes drove the car while Appellee fired several shots into the house. Two others followed in the Jeep for backup. He then hid the truck in Flint. (P 36-77).

Christopher Vintevoghel stated that on March 26, 2002 and on March 28, 2002 he advised Defendant Pipes of his constitutional rights and obtained statements from Pipes. According to Vintevoghel, Pipes stated on March 28, 2002 that he received a telephone call from Appellee, who stated that he knew the whereabouts of the person who shot up his Jeep the night before and asked if Pipes knew where they could rent a car to go to that location to kill that person. Pipes rented a car from a customer for two rocks of crack cocaine. He then provided Appellee with the keys. Appellee

gave him the keys to his Jeep. He followed Appellee to the location as backup. Both Appellee and his driver were armed. They fired several shots at the house before driving off. They both returned to Appellee's house, where they dropped off the guns. Pipes returned the rental car. Appellee stated that he was going to Flint. (P 78-98).

Appellee was bound over to stand trial on counts 1, 3 and 5. Pipes was bound over on Counts 1 and 6, along with an added count of felon in possession of a firearm, in violation of MCL 750.224f. Counts 2 and 4 were dismissed. (P 98-113). On September 12, 16, 17, 18, 19, 23, 2002, trial was conducted for both defendants in the Wayne Circuit Court. A mistrial was declared after an officer testified that Appellee had failed a polygraph examination. On December 2, 2002, they were retried. Following preliminary matters, (T1 4-20), jury selection, (T1 21-202), preliminary instructions (T2 5-17) and opening statements (T2 18-35), the following testimony was presented:

Deneen Thomas testified that she is the mother of Destinee Thomas. On March 23, 2002, they were living on Woodrow Street, along with her two other daughters, her boyfriend Terrell Brown and Brown's mother, sister and brother. Ms. Thomas knew Eddie Smith and Sean Taylor as friends of Mr. Brown who sell drugs in the abandoned house next door. She knew Anthony Carter as the ex-boyfriend of Terrell Brown's sister. At 5:00 that evening, she was in her bedroom when she heard several shots fired. After the shooting ended, she found Destinee in another room lying in a puddle of blood. She observed Smith running across the street holding what appeared to be a long gun wrapped in a blanket. (T2 35-71),

Terrell Brown testified that Deneen Thomas is his fiancée. They lived on Woodrow Street along with her children, his brother, his sister and his mother. He was friends with Appellee. He had an unfriendly relationship with Pipes. According to Brown, Eddie Smith and Sean Taylor sold drugs from a nearby abandoned house. Jackie Close sold drugs a market. At about 5:00 p.m. March 23, 2002, he was entering his house. Smith was with him. Taylor was approaching. His cousin Deonsae was in the doorway. Brown observed a car drive past, followed by a Jeep, which stopped. Shots were then fired from the passenger side of the Jeep. Brown dove into the house. Afterwards,

he heard a scream and ran upstairs. Destinee was lying on the floor. From the window he saw the Jeep drive away. The car which had arrived ahead of the Jeep was already gone. On the date of the incident, he told the police that Appellee was the driver of the Jeep. At trial, he stated that he could not see anyone in the Jeep, and that he told the police Appellee was the driver because he knew that it was Appellee's Jeep. He stated at trial that he was unaware of any conflict between Appellee, Pipes, Smith and Close. He had told the police that there was a conflict. After the shooting, Close and Smith left for two to three hours. They returned briefly and left again. (T2 72-146).

Miles Scott testified that he is a good friend of both Appellee and Defendant Pipes, but he did not know whether they are friends with each other. He knows Terrell Brown, Eddie Smith and Terrance Mitchell from the neighborhood, but he is not friends with them. He does not know Sean Taylor. At about 10:00 a.m. March 23, 2002, he saw Appellee and Pipes at the Rainbow Market in a green Jeep Cherokee. They told him of a dispute they had with Close and Smith. Later that day he saw Smith and Close driving away from Appellee's house. The following day, Appellee came to Scott's house. The Jeep had bullet holes in the door. Appellee asked Scott whether he had seen Smith and Close, and told Miles they had shot his vehicle. (T2 151-249). A transcript of his testimony given pursuant to an investigative subpoena was admitted into evidence. (T3 4-11).

Sawait Kanlue is the Wayne County Medical Examiner. Was qualified as an expert in forensic pathology. He reviewed the report of March 24, 2002 autopsy of Destinee Thomas performed by Dr. Chung. According to the report, there was a grazing gunshot wound on the top of the left shoulder and a gunshot wound which entered behind the left ear and exited the middle of the forehead. Both wounds likely came from the same gunshot. A small fragment was retrieved from inside the head. Death was caused by the gunshot wound to the head, which caused extensive injuries to the skull and brain. The manner of death was homicide (T2 250-264).

Denise Brown testified that she lived at the house on Woodrow. Destinee Thomas was her niece. Terrell Brown is her brother. She was upstairs in her room with Destinee when the shooting took place. Anthony Carson was in the house at the time of the shooting. She knew Appellee from

school, and Pipes from the Rainbow Market. Terrance Mitchell and Jackie Close are brothers to each other and God-brother of Ms. Brown. After the shooting, Eddie Smith, Terrell Brown and Sean Taylor all ran from the house. She did not see Smith holding a gun. (T3 15-69).

Terrance Mitchell stated that he knew Appellee and Pipes from his former neighborhood. He knew the to be friends of each other, and that Appellee drove a green Jeep. He also knew Terrell Brown, Deneen Thomas and Eddie Smith. He did not know Sean Taylor. Jackie Close is his brother. He was unaware of any friction between Appellee and Pipes vis a vis Close and Smith. At or about 5:00 p.m. March 23, 2002, he was exiting a bus to go to Terrell Brown's house. From a block away, he heard three to five gunshots. As he walked toward the house, a green Jeep drove in his direction at a rapid pace. From 8 to 10 feet away, he observed Appellee and Pipes through the passenger window. Pipes was driving. He did not observe any weapons. He did not see a white car with it. After the Jeep passed, he decided not to go to the house. A couple of days later, he learned from Terrell Brown about Destiney's death. (T3 69-149, 154-159).

Detroit Police Officer Kamin Bode testified that he was one of several officers who responded to the shooting. He arrived five minutes after the run was broadcast, and was the third unit to arrive. He entered the house and proceeded upstairs, where he observed a small child laying face down I a pool of blood holding a bag of potato chips. He detected no vital signs. EMS arrived shortly after. Bode observed that the window was open and the wall was spattered with blood and brain matter. The only signs of bullet damage were on the first floor. He spoke with Denise Brown, who gave him information o the child and a summary of the events. Based upon that information, he began to look for a dented green Jeep. (T3 160-174).

Djuana Smith stated that in March, 2002 she dated Appellee and owned a green Jeep, which Appellee often drove. She lived in Flint. On the weekend in question, she left for Chicago on Thursday. When she returned on Sunday morning, her vehicle and her spare set of keys were missing. She called Appellee, who stated that he had it and that he would return it. On Monday, he appeared at her apartment, but without the vehicle. She then went to work. When she returned,

Appellee came to her apartment. He told her that the truck was in front of his house, and that somebody shot at him causing damage to the truck. He told her that he would take her to get it the next day. He spent the night. When she awoke, he was gone. The police arrived later and arrested him at a neighboring store. Her car was returned two weeks later. The rear left window was broken and it had three bullet holes. (T3 175-213).

Detroit Police Officer Michael Choukourian is assigned to the Evidence Technician Unit of the Forensic Services Division. On March 23, 2002, he responded to 5669 Woodrow, where he searched for physical evidence, took notes and measurements, drew a diagram and shot photographs. In the street, he observed broken safety glass and spent shell casings. On the east side of the house were what appeared to be bullet holes. Entering the house, he observed bullet holes in the living room and foyer walls. Upstairs in the southeast corner of the northeast bedroom was a pool of suspected blood. There was a heavy concentration of blood spatter on the bedroom walls and ceiling and in the central hallway. Although he is equipped with and performs gunshot residue testing, he did not test any of the persons, furniture or clothing inside the house. (T3 214-242).

Detroit Police Officer Christopher Gelso was investigating the shooting. In September, 2002, he served Miles Scott with a subpoena (to appear for the proceeding which ended in a mistrial). Scott crumbled the subpoena and slammed the door in his face. Gelso also served Scott with a subpoena to appear for this proceeding. Again, Scott was uncooperative. Gelso further testified that he had arrested Scott during his March, 2002 investigation because he had information that a green Jeep with a partial license plate number 341 had been at the scene of the shooting, and because he had frequently seen Scott with Appellee and Pipes in a green Jeep with a similar license plate number in the area of the Rainbow Market at 14th and Temple. (T4a 12-52).

Detroit Police Officer Arthur Leavells worked with Officer Gelso. He too stated that they had received information about a green Jeep and a partial plate number 341. Leavells reviewed his activity logs, which indicated that there had been a previous contact with a green Jeep with a plate containing the numbers 431. The log associated Appellee, Scott and Defendant Pipes with the Jeep.

Based upon that information, Leavells and his crew detained Scott and Pipes. (T4a 53-68, 76).

Detroit Police Officer Thomas Smith is an evidence technician. In April 2002, he came in contact with a 1998 green Jeep Cherokee with license plate number RZV 431 in the City of Flint. Smith photographed the vehicle. He dusted the vehicle inside and outside for fingerprints, lifting a print from the top of the right front glass on the outside. It was sent to Central Photo Lab to be photographed and from there to Latent Prints for identification. He located two bullet holes. One on the front edge of the rear right door, which also struck the pillar between the doors. The other entered to the right rear quarter panel and was recovered. He also performed gunshot residue testing on all four door panels and the headliner above each door. These findings were placed on evidence and conveyed to the Homicide Section. (T4a 77-112).

William Steiner is a civilian employee of the Detroit Police Department, working as a forensic chemist in the Crime Lab. He was qualified as an expert in forensic chemistry and trace evidence. He examined a gunshot residue test kit performed by Officer Smith, which contained eight separate samples. Steiner detected particles consistent with gunshot residue on the sample taken from the right front headliner, but the quantity of the particles found was not sufficient to actually confirm it as gunshot residue. Based upon his analysis of the samples in this case, he could not whether a gun had been discharged from the green Jeep Cherokee. (T4a 112-124; T4b 4-7).

Detroit Police Officer David Pauch is assigned to the firearms identification unit of the crime lab. He was qualified as an expert in firearms identification and toolmarks. He examined the fired cartridge casings recovered by Officer Michael Choukourian. (c.f. T3 217, 232). In Pauch's opinion, they were all fired from the same weapon. Without the gun itself, he could not determine whether the bullets were fired by the same weapon as the cartridge casings. (T4b 8-28).

Brent Scrutchins is a civilian latent fingerprint examiner employed by the Detroit Police Department. He was qualified as an expert in latent fingerprint identification. He compared the fingerprint lifted from the Jeep by Officer Smith, (C.f. T4a 89-90), with known prints of Appellee and Pipes. In his opinion, the prints from the Jeep were those of Defendant Pipes. (T4b 29-44).

On March 22, 2002, Detroit Police Officer Miguel Bruce was assigned to homicide and investigating the death of Destiney Thomas. In that capacity, he came in contact with Appellee in Flint, Michigan. After transporting Appellee to Detroit, he interviewed Appellee. After first advising Appellee of his constitutional rights, Appellee gave a statement which was reduced to writing. According to Bruce, Appellee stated that was in the Jeep with Pipes and a Damon Clark. They were riding down 14th and Ash when they approached a car occupied by Jackie Close and Eddie Smith. Appellee pulled over. Clark told them that they could not sell drugs in the neighborhood. Close replied that he would do what he pleases. Appellee then drove to the Rainbow Market, located at Wabash and Temple. Clark exited the Jeep. Appellee and Pipes drove around smoking marijuana. Appellee became hungry and stopped at his house to eat. He parked in front of his house with they left wheels to the curb. Pipes ate first and left. As Appellee was eating, he heard five to six gunshots. He ran outside. Close's car heading away from his house and there were bullet holes in his truck. Pipes returned after seeing Close head for Appellee's house. Appellee taped up the windows, returned to Flint and called his girlfriend to let her know what had happened to the truck. When he returned to Detroit, he stopped at the Rainbow Market, where he was approached by Pipes and Clark. Pipes said that they needed to confront Close and Smith right away, and borrowed the Jeep to go get a rental car. Just then, Pierre arrived. Pipes told Pierre about his plans. Pierre and Clark left with Pipes. Appellee remained at the market. Thirty minutes later, Pipes and Clark returned in a rental car, followed by Pierre in the Jeep. Pipes and Clark informed Appellee that he saw Smith and Close on the porch of a house on Woodrow, and that he and Clark shot up the house from the rental car using a nine millimeter and an AK-47, and that Pierre followed them in the Jeep. Appellee became angry that they had involved his girlfriend's Jeep in the shooting and he left for Flint. (T4b 45-58, 65-84; T5 5-33).

Detroit Police Sergeant Christopher Vintevoghel stated that on March 26, 2002 and on March 28, 2002 he advised Defendant Pipes of his constitutional rights and obtained statements from Pipes. According to Vintevoghel, Pipes stated on March 26, 2003 that he was with Appellee at the Rainbow

Party Store when they saw Eddie Smith and Jackie Close. At about 8:00 p.m. he and Appellee then went to Appellee's house to eat. Pipes then left for a nearby house. From there, he heard six or seven shots and observed Close's vehicle coming from Appellee's house with its headlights off. He returned to Appellee's house. Appellee informed Pipes that Close had shot at his vehicle. Pipes observed the damage to the vehicle. Appellee stated that he was going to get Close. The next day, Appellee called Pipes, stating that Close hangs out on Woodrow, that he (Appellee) had borrowed a nine millimeter handgun. At about 10:00 Appellee called back and told Pipes to watch the news. After the report, Appellee called again to state that he did not mean to kill the girl - that he was only trying to shoot Smith. In his March 28, 2002 statement, Pipes informed Vintevoghel that the day after the Jeep was shot, he received a telephone call from Appellee, who stated that he knew the whereabouts of the person who shot up his Jeep the night before and asked if Pipes knew where they could rent a car to go to that location to kill that person. Pipes rented a car from a customer for two rocks of crack cocaine. He then provided Appellee with the keys. Appellee gave him the keys to his Jeep. He followed Appellee to the location as backup. Both Appellee and his driver were armed. They fired several shots at the house before driving off. They both returned to Appellee's house, where they dropped off the guns. Pipes returned the rental car. Appellee stated that he was going to Flint. (T5 39-92).

Detroit Police Officer Derryck Thomas testified that on March 28, 2002 he advised Pipes of his constitutional rights and that Pipes gave him a statement. According to Thomas, Pipes stated that he heard six gunshots and saw Close's vehicle leaving Appellee's house with its headlights off. He ran to Appellee's house. Appellee's Jeep had been shot. The following day, he received a telephone call from Appellee, who stated that he had learned the whereabouts of the person who shot his Jeep, and that he was ready to get him. Appellee drove the Jeep to obtain a base rental. Pipes remained in the Jeep. Appellee got into the rental car. They all returned to the market. He later followed Appellee to Woodrow Street. Thomas further stated that he transported Appellee to be interviewed by Officer Sims, and that from another office he observed, via a television monitor, Sims

advise Appellee of his rights and Appellee give a statement to Sims. (T5 93-133).

Detroit Police Investigator Andrew Sims testified that on March 27, 2002 he advised Appellee of his rights and the two spoke. According to Sims, Appellee refused to make a statement. Sims then memorialized their conversation in a report. According to Sims, Appellee stated that he and Pipes had an argument with two other persons about selling narcotics from their location. Someone then shot up his girlfriend's Jeep. Key rented a car from a crack head. Pipes drove the car while Appellee fired several shots into the house. Two others followed in the Jeep for backup. He then hid the truck in Flint. (T5 134-152, 177-187).

A due diligence hearing was conducted to determine the prosecution's efforts to locate Sean Taylor. Detroit Police Officer Glynn Davis testified that he was the officer in charge of the case and responsible for serving witness subpoenas. Davis stated that he did serve Taylor to appear at Appellee's first trial, and that Taylor was very cooperative. For the second trial, he spoke with Taylor's mother on Friday, November 29, 2002, three days before trial was to begin. She stated that she not seen him since Thanksgiving, which was the day before, and that she had no telephone number for her son. She did provide an address on McDougall Street, where Davis had served Taylor for the first trial. Davis visited the house, which appeared to be fire damaged. The house was furnished but the door was wide open. It appeared to be vacant. Davis also checked local jails and hospitals, utilities and social services agencies and the morgue but without success. He did not check with the Secretary of State. Other witnesses in the case also provided the McDougall Street address. (T5 155-165). Over defense counsel's objections, the prosecution was permitted to read Taylor's testimony from Appellee's first trial. (T5 165-170).

In his former testimony, Sean Taylor stated that he knows Terrell Brown, Eddie Smith and Jackie Mitchell (Jackie Close). He did not know Appellee or Pipes. On March 23, 2002, he was on the side of Brown's house when he observed a small blue car approach. It was followed by a Jeep. A gun was protruding from the passenger side of the car. Taylor heard 15 to 20 gunshots fired. He ran to the alley. He could not recall where Smith or Brown were at the time. When he returned

to the front of the house, he observed Brown and Deneen Thomas upstairs. He then ran to a pay telephone to call for an ambulance. He was later taken to the Homicide Section, where he provided a statement to the police. He described the shooter as a 22 to 23 year old medium dark complected clean shaven male with a slim build. He acknowledged lying about the description. (T5 189-232).

Over defense objection, the 911 tape was played to the jury. (T5 233). All remaining prosecution witnesses were waived. Defendant Pipes stipulated that he had a prior felony conviction, which made him ineligible to possess a firearm. The prosecution then rested. (T5 234-239). Appellee's motion for directed verdict was heard and denied. (T5 240-244). The defense rested. (T6 17). Following closing arguments (T6 32-103) and final jury instructions (T6 123-155), Appellee was found guilty as charged of first degree premeditated murder. As to all remaining charges, he was found not guilty. (T7 5-9). On January 9, 2003, he was sentenced to life imprisonment. (S 13).

On November 18, 2003, Appellee timely filed an appeal to the Michigan Court of Appeals. In an opinion dated May 31, 2005, his conviction was reversed. On July 25, 2005, Plaintiff-Appellant filed an Application for Leave to Appeal to this Honorable Court.

ARGUMENT III

THE MICHIGAN COURT OF APPEALS PROPERLY REVERSED APPELLEE'S CONVICTION WHERE THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED APPELLEE HIS DUE PROCESS RIGHTS TO A FAIR TRIAL WHEN IT DENIED HIS MOTION FOR SEPARATE TRIALS OR SEPARATE JURIES.

Issue Preservation and Standard of Review

The issue was preserved by defense counsel's motion for severance. (T1 10-11). A trial court's decision on a motion to sever defendants' trials is reviewed for an abuse of discretion. People v Hana, 447 Mich 325 (1994).

Discussion

It was the prosecution's theory of the case that Appellant and/or Pipes shot and killed Destiney Thomas while attempting to kill Eddie Smith, Terrell Brown and/or Sean Taylor to take revenge for the shooting of Appellant's Jeep. Appellant's defense theory, advanced through his counsel's opening statement, cross-examinations, and closing argument, was that the prosecution witnesses were inconsistent and unreliable and that the evidence was insufficient. (T2 28-35; T5 76-91). See generally cross-examinations.

The due process clauses of the Michigan and federal constitutions guarantee an accused's right to a fair trial. US Const Ams V, XIV, Mich Const 1963, art 1, § 17. In the present case, in the face of these antagonistic and mutually exclusive defenses, the trial court's failure to grant separate trials or at least separate juries denied Appellant a fair trial.

MCR 6.121(C), regarding mandatory severance, provides that: "On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant."

MCR 6.121(D), regarding discretionary severance, provides in relevant part that "the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants".

In People v Hana, 447 Mich 325 (1994), the Court discussed the standards for severance of co-defendants' trials under MCR 6.121(C). The Hana Court concluded that severance is only

mandated under MCR 6.121(C) where the defendant provides the court with a supporting affidavit, "or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." At 346. Finding that there is no per se rule for severance when co-defendants present "antagonistic defenses", the Court stated:

Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable'. Moreover, "[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. The 'tension between defenses must be so great that the jury would have to believe one defendant at the expense of the other'. Otherwise stated,

'It is natural that defendants accused of the same crime and tried together will attempt to escape conviction by pointing the finger at each other. Whenever this occurs the co-defendants are, to some extent, forced to defend against their co-defendant as well as the government. This situation results in the sort of compelling prejudice requiring reversal, however, only when the competing defenses are so antagonistic at their cores that both cannot be believed. Consequently, we hold that a defendant seeking severance based on antagonistic defenses must demonstrate that his or her defense is so antagonistic to the co-defendants that the defenses are mutually exclusive. Moreover, defenses are mutually exclusive within the meaning of this rule if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant.'

(At 349-350) (Citations omitted).

The Hana Court went on to note that the risk of prejudice faced by multiple defendants tried together may be allayed by the use of dual juries, a partial form of severance, to be evaluated under the same standards applicable to motions for separate trials. At 351.

In the present case, prior to jury selection, counsel requested separate juries. The request had earlier been made before the start of the first trial. Again, the request was denied. (T1 10-11) Appellee contends that the trial court abused its discretion in not severing the cases. Appellee adopts the opinion of the Michigan Court of Appeals, which reversed Appellee's conviction, stating:

"In this case, by its own admission, the trial court focused only on the proposed defenses of each defendant in determining that severance was not required. The trial court erred by failing to give sufficient consideration to the prosecutor's intention to offer the custodial statements of each defendant into evidence before the same jury. In Hana, supra, at 346 n 7, our Supreme Court observed that potentially

reversible prejudice requiring separate trials can occur when “evidence that they jury should not consider against a defendant and that would be admissible if a defendant were tried alone is admitted against a codefendant,” quoting Zafiro v United States, 506 US 534, 539; 113 S Ct 933; 122 L Ed 2d 317 (1993). Our Supreme Court also noted that “[e]vidence that is probative of a defendant’s guilt but technically admissible only against a codefendant also might present a risk of prejudice. Hana, supra, at 346 n 7, quoting Zafiro, supra, at 539.

“In Bruton v United States, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968), the United States Supreme Court held that a defendant is deprived of his right to confrontation when his codefendant’s incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. Cruz v New York, 481 US 186, 187-188; 107 S Ct 1714; 95 L Ed 2d 162 (1987). See also People v Frazier (After Remand), 446 Mich 539, 544-545; 521 NW 2d 291 (1994) (Brickley, J). The Court observed:

“In joint trials . . . when the admissible confession of one defendant inculcates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of consider it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot ‘segregate evidence into separate intellectual boxes.’ [Bruton, supra at 131.]

“The Court further stated that “[a] defendant may be prejudiced by the admission in evidence against a co-defendant of a statement of a statement or confession made by that co-defendant,” and that “[t]his prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand.” Id at 132.

“[T]here are some contexts in which the risks that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the codefendant, are deliberately spread before the jury in a joint trial. Not only are the incrimination s devastating to the defendant but their credibility is inevitably suspect, a fact recognized when defendant do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. [Id at 135-136 (citations omitted).]

“Additionally, the United States Supreme Court has held that the rule from Bruton applies even in the situation where the defendant has also confessed and his unredacted statement is “interlocking” with the codefendant’s statement. Cruz, supra at 191-194. Writing for the majority, Justice Scalia noted the “devastating” practical effect of codefendant testimony without cross-examination referenced in Bruton. Id at 191. The Court found it “impossible to imagine why there should be excluded from that category [codefendant confessions], as generally not ‘devastating,’ codefendant confessions that ‘interlock’ with a defendant’s own confession.” Cruz, supra at 191-192. “[T]he infinite variability of inculpatory statements (whether made

by defendants or codefendants), and their likely effect on juries, makes [the assumption that an interlocking confession will preclude devastation] untenable.” *Id* at 192, quoting *Parker, supra* at 84 Stevens, J. dissenting). Justice Scalia reasoned that usually a defendant tries to negate or avoid the consequences of a confession and the admission of a codefendant’s custodial account that corroborates that confession presents a serious obstacle to that strategy. *Id* at 192. Thus, the Court held that “where a nontestifying codefendant’s confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant’s own confession is admitted against him.” *Id* at 193 (internal citation omitted).¹

* * * * *

“In This case, both defendants were prejudiced by the admission of each other’s unredacted statements. Witnesses did not get a clear look who was actually responsible for the shooting. There were varying accounts of which vehicles were involved, who was in the vehicles, and which vehicle was the source of the gunfire. In an attempt to exonerate himself, defendant Pipes implicated defendant Key in all three of his statements to the police. Defendant Key similarly implicated defendant Pipes in his two statements to the police, while additionally admitting his own involvement in the shooting in his second statement. Because defendants gave conflicting statements, the jury had to decide which statements were accurate. Indeed, it appears that the they jury was unable to determine the identify of the actual shooter, because neither defendant was convicted of felony-firearm.

“Under the circumstances, we conclude that both defendants were, at a minimum, entitled to trials before separate juries, given that the prosecution intended to offer into evidence the statements of each defendant, and that each defendant implicated the other in their own statements. The admission of these unredacted statements at trial violated each defendant’s right of confrontation, because neither defendant testified at trial and thus was not subject to cross-examination. Because the properly evidence of guilt was not overwhelming, and because the prejudicial effect of the codefendants’ statements against each other was significant by comparison, *Banks, supra* at 427, we are compelled to reverse the convictions of both defendants on this basis and remand for new trials.” [6-8].

Appellee therefore prays Plaintiff-Appellant’s Application for Leave to Appeal be denied.

¹The United States Supreme Court’s recent decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), further supports barring the use of a nontestifying codefendant’s statement in a joint trial. In *Crawford*, the Court held that out-of-court statements that are testimonial in nature are barred under the Confrontation Clause where the defendant is unavailable, unless the defendant had a prior opportunity to cross-examine the witness. *People v Bell (On Second Remand)*, 264 Mich App 58, 61-63; 689 NW 2d 732 (2004).

RELIEF REQUESTED

WHEREFORE, Defendant-Appellee Julian Dale Key prays this Honorable Court deny Plaintiff-Appellant's Application for Leave to Appeal.



JONATHAN B.D. SIMON (P35596)
Attorney for Appellant
645 Griswold, Suite 717
Detroit, Michigan 48226
(313) 964-0533

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